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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 18

GEORGE EARL TOOLSON,

Petitioner,

v.

NEW YORK YANKEES, INC., *et al.*,

Respondents.

No. 23

WALTER J. KOWALSKI,

Petitioner,

v.

ALBERT B. CHANDLER, Individually and as Commissioner of Baseball, *et al.*,

Respondents.

No. 25

JACK CORBETT and EL PASO BASEBALL CLUB, INC.,

Petitioners,

v.

ALBERT B. CHANDLER, Individually and as Commissioner of Baseball, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE SIXTH CIRCUIT

PETITION FOR REARGUMENT

HOWARD C. PARKE,
FREDERIC A. JOHNSON,
Attorneys for Petitioners.

In the

Supreme Court of the United States

October Term, 1953

No. 15

George Earl Toolson,

Petitioner,

v.

New York Yankees, Inc., *et al.*,

Respondents.

No. 22

Walter J. Kowalski,

Petitioner,

v.

Albert B. Chandler, Individually and as Commissioner of Baseball, *et al.*,

Respondents.

No. 25

Jack Corbett and El Paso Baseball Club, Inc.,

Petitioners,

v.

Albert B. Chandler, Individually and as Commissioner of Baseball, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court for the Sixth Circuit.

PETITION FOR REARGUMENT

To the said Honorable Court

It is most respectfully requested that this Court grant a reargument in the above matters for the following reasons:

That the majority opinion holds that *Federal Baseball Club* case (259 U. S. 200) held baseball exempt from the Sherman Act; that Congress did not, in the period which has elapsed since the decision, take any action to include baseball; that baseball expanded on the understanding that it was exempt. Therefore the petitioners have no retrospective rights under the Sherman Act for the wrongs committed by the respondents, and will obtain rights only if, as and when Congress deems it necessary to include baseball within any of the Anti-Trust Acts.

This determination raises a question of fact. Was the expansion of organized baseball made "on the understanding" that it was exempt from the Sherman Act?

We respectfully call attention to the correct facts. Up to 1948 it may be assumed that everyone thought baseball not only exempt from the Sherman Act, but exempt from Congressional jurisdiction to put them under it. This concept resulted from Mr. Justice Holmes' decision made for this Court, that the local exhibition of baseball was not trade or commerce. In that sense, it was not interstate commerce, for wherever trade and commerce, as terms, were used, they conveyed the meaning of interstate commerce within the Commerce Clause. Thus it was conceived to be the rule that sports when played locally before a concourse of people were not subject to interstate commerce implications. The number of players held by the teams were always limited, and the travel was said to be incidental.

Everyone understood the above as the only meaning to be attributed to the *Federal Baseball Club* case. Judge Landis never sanctioned farms, international agreements, blacklists, and freed many players when the club owners attempted to cover them up. Broadcasting did not assume any large proportions under Landis, and telecasting did not come into play until Commissioner Chandler came to office. Though organized baseball indulged in the

[illegible] Federal Baseball Club v. National League, 259 U.S. 200 (1922), in 1948 and the investigation by the Subcommittee on Study of Monopoly Power of the House of Representatives Committee on the Judiciary. See also Toolson v. New York Yankees, 346 U.S. 356 (1953). [illegible] Congress. [illegible] Federal Baseball Club [illegible] baseball. [illegible] baseball [illegible] Congress. [illegible] baseball [illegible] baseball [illegible] baseball

the labouring and broadcasting into Minor League territory and internationally for very great amounts of money. It will not do to fob off the matter by making a statement of fact, a claimed understanding, when the facts presented will show the contrary. Organized Baseball relied on the dictionary of Webster, its legal counsel for the major activities of its organization, as to the meaning of "league and the international agreements relied upon the "reasonable man" rule, rather than any other exposition. It claimed that these were incidents to the local exhibitions and that Congress was without power to regulate it, however it might be expected. Even it was never made the claim from 1922 to date that Organized Baseball could be included in the Sherman Act but very specifically kept out. Mr. Justice Holmes never said that it was an exhibition, and the record sets never claimed in any case that we know of, or before the Congressional Committee that he made such a proposition. Moreover it was never said by Organized Baseball that Congress permitted them to expand on any such understanding. They argued that the local nature of the exhibition was without the Constitutional power to put them in the Sherman Act; that the expansions were the acts of third parties, sponsors and broadcast companies; that the fact that you could turn on the games in 89 million homes was not the transportation of the game by organized baseball, but by third parties; that the reserve clauses and the international agreements were reasonable. They never dared state that Congress had estopped itself by the claimed inaction to pass legislation. Congress after 1948 had jurisdiction under Gardella's case for the expanded activities, and would not need any legislation. Organized baseball recognized this by praying Congress to grant them immunity. Who can truthfully argue that this request made of Congress many times, and many times denied, invoked any "understanding" so as to estop the legislative body? The opposite is shown: Baseball by requesting exemption showed its understanding that it was included for the expanded activities and desired a green light.

Surely it is not creditable to make a decision resting on a fictitious hypothesis and thus deprive the petitioners of a trial as to the extent of the interstate activities, and whether they are the whole, and a trial as to the reasonableness of the structure of the monopoly under the terms.

We have additional complications. The government claimed football and boxing were within the Sherman Act. It brought suit to strike down certain agreements of organized football and boxing in respect of the broadcasts. Originally the Department of Justice relied upon Gardella's case. But the decision came down a few days after the opinions were filed. In place of reliance on Gardella, the District Judge made his determination that the very expanded activity of a sport (football) into broadcasting and telecasting was interstate commerce, and thereby covered by the Sherman Act as written. So that it is clear that the Department of Justice never thought there was any "understanding" by Congress. How the portion of such activities covered by the Philadelphia Court's decision can be interstate under the Sherman Act, and the whole, including and swallowing that the portion adjudicated in Philadelphia . . . be said by this Court to be without the Sherman Act as written is one of those additional contradictions and confusions. If it be thought to rest these cases on any policy of accommodation it is best to rest them on the true principle, that those who desire from any particular Congress exemptions from past Congressional Acts, should seek them out prospectively from the legislature. Not use the Courts for legislative power.

The interpretation of the Sherman Law in the majority's opinion can have unfortunate consequences extending far beyond the cases at bar and even the subject matter of this litigation.

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[1] *U. S.* v. *National Football League* (Civ. Action No. 12808, Eastern Dist. of Pa., decided Nov. 12, 1953), football's expansion is an atom compared to baseball's expasions since 1948.

Wherefore, petitioner respectfully prays that the Court may issue its writ of certiorari to the United States Court of Appeals for the Second Circuit, and that the petition for certiorari be granted and that the judgment of the Court of Appeals and of the District Court be reversed and that of the United States be entered.

Respectfully submitted,

Howard C. Petze,
Terrence A. Jourdan,
Attorneys for Petitioner.

Certificate.

The undersigned, attorneys for Petitioner, hereby certify that the foregoing Petition is presented herein in good faith and not for delay.

Howard C. Petze

Terrence A. Jourdan

New York, N. Y., November 20, 1953.